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No. 09-1147

Supreme Court, U.S.
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In The
Supreme Court of the United States

NICHOLAS LOHMAN,

Petitioner,

v.

DURYEA BOROUGH, DURYEA BOROUGH COUNCIL, ANN DOMMES, LOIS MORREALE, FRANK GROBLEWSKI, EDWARD ORKWIS, ROBERT WEBB, AUDREY YAGER and JOAN ORLOSKI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's consideration of settlement negotiations in determining an award of attorney fees does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's consideration of the hourly rates of defense counsel in this case does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties remaining in the case.

CORPORATE DISCLOSURE STATEMENT

Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski, are a municipality and its governing body, Borough Council, the individual members of council and the Borough's Borough Secretary. As such, Respondents are government entities and are not corporations, do not have any parent corporation or any corporate stock.

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STATEMENT OF THE CASE

Petitioner, Nicholas Lohman ("Lohman"), brought the underlying action against Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski ("Duryea Borough"), alleging violations of the procedural component of the Fourteenth Amendment, First Amendment retaliation claims, publicity given to a private life and wrongful discharge. Pet. App. 16. At the close of discovery, Duryea Borough moved for summary judgment on all counts. The District Court granted summary judgment on all claims except Lohman's claims of First Amendment retaliation, which proceeded to trial. *Id.* At the close of Lohman's case, the District Court dismissed Respondents Orkwis and Morreale from the case on a motion for judgment as a matter of law. *Id.* The jury reached its verdict on April 23, 2008. The jury found in favor of Lohman on his First Amendment retaliation claim with respect to his assistance in filing a grievance against all Respondents except Robert Webb. They found in favor of all Respondents on Lohman's claim of First Amendment retaliation with respect to his union contract negotiations. Pet. App. 16-17. For his successful claims, the jury awarded Lohman damages for lost wages in the amount of $7,320.00 against Duryea Borough and $1,220.00 each against Dommes, Groblewksi, Yager and Orloski. The jury also awarded one dollar in nominal damages against all Respondents except Robert Webb. Pet. App. 17.

Lohman's initial demand to settle this matter was five-hundred thousand dollars ($500,000.00) in compensatory and punitive damages. Pet. App. 46. Duryea Borough offered thirty-thousand dollars ($30,000.00). *Id.* After trial commenced, Duryea Borough made three additional offers – twenty-five thousand dollars ($25,000) plus the job of chief of police, fifty-thousand dollars ($50,000.00) plus the job of chief of police, and seventy-five thousand dollars ($75,000.00) without the job of chief of police. Pet. App. 46-47. These offers were rejected by Lohman. Pet. App. 47.

Following the verdict at trial, Lohman requested attorney's fees and costs in the amount of $112,883.73. Pet. App. 18. The request sought an hourly rate determination of $300.00 for a total of 356 hours. Pet. App. 20. Duryea Borough opposed Lohman's request and made very specific objections to each and every problematic time entry. The District Court reduced the total number of hours by 46.8 hours for duplicativeness, 4.80 hours for inapplicability, and 35.70 hours due to excessiveness. Pet. App. 21-30. Those reductions have not been appealed by Lohman.

The District Court next determined that the appropriate hourly rate for Plaintiff's counsel was $215. The District Court, who is very familiar with Plaintiff's counsel's work and skill, reached this rate by analyzing the affidavits submitted by both Lohman's counsel and those submitted by counsel for Duryea Borough. Pet. App. 30-39.

The above calculations resulted in a total lodestar calculation of $59,060.50. Pet. App. 40. The District Court then made additional considerations as to whether to adjust the fee upward or downward, specifically looking at the *Johnson*[1] factors, apportionment, settlement negotiations, and the degree of success obtained. Based on these additional considerations, the District Court adjusted its fee award to $30,000.00. Pet. App. 54.

The District Court, in reducing the lodestar, noted that this Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." Pet. App. 47; *citing Hensley* at 436. In construing Federal Rule of Evidence 408, which governs the use of settlement negotiations, the District Court found a decision by the District Court for the Southern District of New York to be persuasive. That decision held that "evidence of the alleged settlement negotiations is not being offered to prove 'either liability for or invalidity of the claim or its amount.' Rather it is being offered to show that the Court's rejection of the claim should not merit an award of attorney's fees under the Court's power of equitable discretion." Pet. App. 50; *citing EMI Catalogue Partnership v. CBS/Fox Co.*, No. 86 Civ. 1149 (PKL), 1996 WL 280813, at *2 (S.D.N.Y. May 24, 1996) (finding

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[1] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

that Rule 408 does not bar consideration of settlement discussions in determining whether to award attorney's fees under the Copyright Act). The District Court in this case agreed with the reasoning of the District Court for the Southern District of New York that evidence of settlement negotiations is not barred in an application for attorney's fees, since the same is not used to show liability or validity of a claim or amount. Pet. App. 51. Relying on this Court's decision in *Hensley*, the District Court concluded that the settlement negotiations are to be used as an indicator of the "degree of success obtained" by Plaintiff's counsel, and that it would therefore consider the settlement negotiations in its determination of Plaintiff's attorney's fee award. Pet. App. 51; *citing Hensley*, 461 U.S. at 436.

Lohman then appealed the District Court's award of attorney's fees to the Third Circuit, which affirmed the award. The Third Circuit addressed Lohman's appeal of the District Court's determination of his counsel's hourly rate in a footnote, in which it acknowledged that a district court's determination of an attorney's reasonable hourly rate will not be upset unless found to be clearly erroneous, and further that there was ample evidence to support the Court's lower rate. Pet. App. 4.

In reviewing the District Court's consideration of settlement negotiations, the Third Circuit agreed that

> . . . Rule 408 does not bar a court's consideration of settlement negotiations in its

> analysis of what constitutes a reasonable fee award in a particular case. By its terms, Rule 408 requires exclusion of evidence of such negotiations "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction."

Pet. App. 10.

The Third Circuit further held that evidence of settlement negotiations as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408, and that such evidence can be relevant when determining the degree of success. Pet. App. 11; *citing Hensley*, 461 U.S. at 436 ("[t]here is no precise rule or formula" for determining how a fee should be adjusted to reflect limited success). The Third Circuit affirmed the District Court's consideration of settlement negotiations, concluding that "[w]hile evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator that is not precluded by Rule 408." Pet. App. 11. In reaching this conclusion, the Third Circuit rejected Lohman's public policy argument and argument that Federal Rule of Civil Procedure 68, Offer of Judgment, precludes the consideration of settlement negotiations by the District Court. Pet. App. 12-13. Finally, the Third Circuit noted that settlement negotiations *may* be relevant in measuring success, and, if so, are clearly only one factor to be considered in the award of fees, and remarked that in

this case, the District Court considered many factors before awarding Lohman's counsel a fee of $30,000.00. Pet. App. 13-14.

Following the denial of a Petition for Rehearing *En Banc* (Pet. App. 61), Lohman filed the instant Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

Lohman submits that this Court should grant its Petition for Writ of Certiorari in order to rule on the issues of whether settlement negotiations may be used to reduce a fee petition, and whether the lower courts improperly considered defense counsel's hourly rates in determining the market rate for civil rights plaintiffs' attorneys. Duryea Borough submits that Lohman has not carried his burden of demonstrating "compelling reasons" for this Court to grant his Petition. *See* Supreme Court Rule 10. The decisions of the Third Circuit Court of Appeals and the District Court for the Middle District of Pennsylvania do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. *Id.*

I. Contrary to Lohman's assertion, there is no compelling reason for review of the decisions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of consideration of settlement negotiations in determining a reasonable attorney's fee award.

Lohman incorrectly avers that there is a split in the circuits as to whether settlement negotiations can be used to reduce a fee petition. Pet. at 2. In support of his argument that such a circuit split exists, Lohman cites to cases out of the Second, Fourth and Tenth Circuits. However, these cases are all distinguishable from the case at bar and do not, as Lohman would lead this Court to believe, stand for the proposition that settlement negotiations cannot be considered in reducing a fee petition. As the Third Circuit noted, " . . . the cases relied on by Lohman regarding Rule 68 are factually distinguishable and do not set forth a categorical rule that applies here." Pet. App. 14; *Lohman v. Duryea Borough*, 574 F.3d 163, 169 n.4 (3d Cir. 2009). Specifically, the Third Circuit panel distinguished these cases as follows:

> In *Ortiz v. Regan*, 980 F.2d 138 (2d Cir. 1992), the Court of Appeals for the Second Circuit rejected a district court's denial of fees for work performed by plaintiff's counsel after the defendants offered the plaintiff a post-deprivation hearing. Instead of requesting a hearing, plaintiff proceeded with her due process claim based on defendants'

conduct prior to the suspension of her retirement benefits. The court of appeals stated that the "availability of Rule 68" provided "additional weight" for its conclusion that the district court abused its discretion by cutting off all fees incurred after the rejected offer. *Id.* at 141. The District Court here did not cut off all fees incurred after Lohman rejected Appellees' settlement offer.

In *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), the Court of Appeals for the Fourth Circuit concluded that a district court erred in applying Rule 68, because the offer in question did not meet the formality requirements of the Rule. *Id.* at 423. The case at bar does not involve any application of Rule 68.

In *Cooper v. Utah*, 894 F.2d 1169 (10th Cir. 1990), the Court of Appeals for the Tenth Circuit determined that a district court erred by reducing a fee award to one half of the lodestar based on simplicity of issues, because simplicity of issues should have been factored into the determination of the lodestar. *Id.* at 1171. In a terse statement, the court "[a]dditionally" noted that the district court's reduction of fees in light of settlement negotiations was "not well-founded" where defendants failed to make an offer of judgment under Rule 68. *Id.* at 1172. There is no indication that the district court's use of settlement negotiations in *Cooper* was analogous to the application in this case, nor is it

> clear that the settlement issue was necessary to the holding on appeal.

Id.

The cases relied upon by Lohman, *Ortiz*, *Clark*, and *Cooper*, do not stand for the proposition that a court may not consider settlement negotiations when determining an award of attorney fees. While the Third Circuit, in this case, and the Seventh Circuit, in *Moriarty v. Svec, et al.*, 233 F.3d 955 (7th Cir. 2000),[2] have held that a court should consider settlement offers as a factor in determining an award of reasonable attorney fees, no other Circuit Court of Appeals has specifically addressed this issue. As such, there is no split in the Circuits on this issue, and therefore no compelling reason for this Court to grant Lohman's Petition for Writ of Certiorari.

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[2] In *Moriarty*, a case which involved claims pursuant to the Employee Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA"), the Seventh Circuit held that "substantial settlement offers should be considered by the district court as a factor in determining an award of reasonable attorney's fees, even where Rule 68 does not apply." 233 F.3d 955 at 967. The Seventh Circuit further stated that the "district court must only consider the substantial settlement offer; it need not reduce the lodestar calculation because of the offer." *Id.*

II. Contrary to Lohman's assertion, there is no compelling reason for review of the decisions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of Lohman's counsel's hourly rate.

Lohman asserts that it was improper for the District Court (and the Third Circuit, in affirming the District Court) to consider defense counsel's rates in determining Lohman's counsel's rates. Lohman does not present any compelling reason for this Court to grant his Petition for Writ of Certiorari on this issue. There is no split in the Circuits or otherwise compelling federal question which would require review by this Court.

Moreover, the matter of an attorney's marketplace billing rate is a factual question which is subject to a clearly erroneous standard of review. *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996); *citing Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, [illegible] (3d Cir. 1988) (*citing Black Grievance Committee v. Philadelphia Electric Co.*, 802 F.2d 648, 652 (3d Cir. 1986) (citation omitted), *vacated on other grounds*, 483 U.S. 1015, 107 S. Ct. 3255, 97 L. Ed. 2d 754 (1987)). More generally, the appellate court may not upset a trial court's exercise of discretion on the basis of a visceral disagreement with the lower court's decision. Similarly, the appellate court may not reverse where the trial court employs correct standards and procedures, and makes

findings of fact not clearly erroneous. *Id.* In this case, the Third Circuit concluded, in a footnote, that

> . . . there was ample evidence to support the [District] Court's lower rate and we conclude that the [District] Court did not clearly err in choosing the rate that it did. *See Interfaith Comty. Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 703 n.5 (3d Cir. 2005) ("[W]e will not upset a district court's factual determinations, including its determination of an attorney's reasonable hourly rate and the number of hours he or she reasonably worked on the case, unless we find them to be clearly erroneous.").

Pet. App. 4; *Lohman v. Duryea Borough*, 574 F.3d 163, 164 n.1 (3d Cir. 2009).

The opinions of the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania on the issue of Lohman's counsel's hourly rate are not clearly erroneous. Moreover, the opinions comport with the law of the Third Circuit, and are in harmony with every other Circuit. For the foregoing reasons, Lohman has not met his burden in establishing that there is a compelling reason for this Court to grant his Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). As such, this Court should deny Lohman's Petition.

CONCLUSION

For the foregoing reasons, Respondents, Duryea Borough, Duryea Borough Council, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkwis, Robert Webb, Audrey Yager and Joan Orloski, respectfully submit that this Court should deny Lohman's Petition for a Writ of Certiorari.

Respectfully submitted,

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